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MICHAEL RODAK, JR., CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1976

No. 76-712

PHYLLIS ANNE STEWART,

*Appellant,*

vs.

THE UNITED STATES OF AMERICA; EARL BUTZ, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA; and GRAY F. REYNOLDS, SUPERINTENDENT AND AREA RANGER HAVING ADMINISTRATIVE AUTHORITY FOR THE SAWTOOTH NATIONAL RECREATION AREA, IN HIS OFFICIAL CAPACITY

*Appellees.*

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**JURISDICTIONAL STATEMENT**

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Attorneys for Appellant

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Appellant was a named plaintiff in an action before a three-judge district court, in the District of Idaho, challenging, *inter alia*, the constitutionality of a federal statutory scheme known as an Act Establishing the Sawtooth National Recreation Area, 16 U.S.C. §§ 460aa et seq., Vol. 16, U.S.C. 1970 Edition, at p. 1105, Supplement V, 1975. In the action before the

three-judge district court, appellant sought injunctive relief permanently enjoining the enforcement of said act pursuant to the provisions of 28 U.S.C. § 2284. No certification pursuant to 28 U.S.C. § 2403 has been made.

A final order in the matter was made and entered by the three-judge district court on August 23, 1976, and appellant's notice of appeal was filed September 22, 1976, with the United States District Court for the District of Idaho.

Jurisdiction is conferred pursuant to the provisions of 28 U.S.C. § 1253.

The following cases support jurisdiction pursuant to 28 U.S.C. § 1253 and the proposition that when, as in this case, the three-judge court goes to the merits of the case in its decision and by that decision grants or denies a requested injunction, direct appeal lies to this court. The three-judge court decided on the merits of appellant's constitutional challenge. *M.T.M., Inc. vs. Baxley*, 420 U.S. 799 (1975); *Gonzales vs. Automatic Employees Credit Union*, 419 U.S. 90 (1974); *Weinberger vs. Salfi*, 419 U.S. 992 (1974) (probable jurisdiction noted in appeal from 373 F. Supp. 961); *Lynch vs. Household Fin. Corp.*, 405 U.S. 538 (1972), rehearing den. 406 U.S. 911 (dismissal by three-judge court for lack of subject matter jurisdiction did not preclude review).

The text of the act at issue is lengthy and is set out in pertinent part hereafter in Appendix A.

The act is challenged on the grounds that its terms are vague, ambiguous, over-broad and set no discern-

able standards by which the act may be applied. The provisions are too subjective to be rationally applied and are arbitrary and violative of appellant's right to due process. The standards set out in the act are based upon totally subjective determination of "values", such as "scenic, natural, historic, pastoral, wildlife and other values." 16 U.S.C. § 460aa-1(a). Such an over-broad, subjective, arbitrary and ambiguous act, lacking objective standards for application, must be found to be unconstitutional as depriving appellant of due process. It should be noted that the act applies to land located in the Sawtooth National Recreation Area and nowhere else.

Another question presented by this appeal involves the constitutionality of a federal statutory scheme intended for, and utilized for, control of privately owned real property within the boundaries of the State of Idaho. Appellant, supported by the State of Idaho appearing *amicus curiae*, asked the district court to enjoin any application of the act on the grounds that the federal government is not constitutionally empowered to regulate the use of private property located within a state and that such regulation is a function of the state and local governmental entities. 16 U.S.C. § 460aa-3(a) states, in pertinent part: "The Secretary shall make and publish regulations setting standards for the use, subdivision and development of privately owned property within the boundaries of the recreation area."

Appellant does not question the eminent domain power of the federal government, but does question the authority of Congress to empower an administrative agency to promulgate "land use planning" regu-

lations or "zoning regulations" applicable to private lands within a state. Appellant maintains that this is an unconstitutional statutory provision in that it usurps the power of the state and regulates private land use within the Sawtooth National Recreation Area. Appellant argues that the statute is unconstitutional as an abuse of the legitimate power of eminent domain by utilizing a non-existent "federal police power" to coerce compliance with the general federal scheme or plan without remuneration and that this is a prior restraint on land use constituting a taking of property without due process of law and without just compensation.

A copy of the relevant final orders and appellant's notice of appeal are appended hereto in Appendix B.

#### STATEMENT OF THE CASE

On August 2, 1972, the United States Congress enacted Public Law No. 92-400, 86 Stat. § 612, codified at 16 U.S.C. § 460aa, et seq., establishing the Sawtooth National Recreation Area in Idaho. Regulations were subsequently promulgated by the Secretary of Agriculture pursuant to purported authority granted by 16 U.S.C. § 460aa-3. Those regulations are purportedly designed to guide the supervision by the Department of Agriculture of private land use within the outer boundaries of the recreation area. The regulations became effective April 29, 1974. Private property owners within the outer boundaries of the recreation area were disturbed by the total lack of respect for private property rights exhibited by the federal government and evidenced by the unconstitutional "authorization" in the act calling for federal governmental land use control over private property. Further,

the private land owners were disturbed with the ambiguity and the subjective nature of the act.

On October 29, 1974, this action was filed in the United States District Court for the District of Idaho. Jurisdiction was alleged under 16 U.S.C. § 460aa-3(a) and plaintiffs asked for relief pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201 and § 2202. The complaint requested the empaneling of a three-judge district court to hear the matter pursuant to 28 U.S.C. §§ 2282 and 2284, for the reasons that an act of Congress and its constitutionality was drawn into question by the pleadings and the action sought an injunction against the enforcement of the act.

On September 18, 1975, Chief Judge Ray McNichols of the United States District Court for the District of Idaho granted plaintiffs thirty days to amend their complaint. The amended complaint alleged "pendent jurisdiction" of the matter since the Idaho District Court has original jurisdiction for review of the regulations under 16 U.S.C. § 460aa-3(a). Plaintiffs maintained that under the doctrine of pendent jurisdiction, the United States District Court for the District of Idaho had jurisdiction to grant declaratory relief as to the statutory scheme as well as to the regulatory scheme. Plaintiffs, in the amended complaint, asked for the formation of a three-judge court pursuant to 28 U.S.C. §§ 2282 and 2284. Plaintiffs asked for declaratory relief and a permanent injunction restraining the application of both the act and the regulations.

On June 25, 1975, the three-judge court convened to hear the matter and entered an order (a copy of which is appended hereto) granting defendants' mo-

tion to dismiss for lack of jurisdiction *and* holding "that the statutory scheme is well within the constitutional powers of Congress under eminent domain and property clauses of the United States Constitution."

The order was "without prejudice to the right of amendment." Pursuant to the "right to amend" language in the June 25, 1976, order, a second amended complaint and motion for leave to file second amended complaint was filed by the appellant. Jurisdiction was alleged under 28 U.S.C. § 1331. The complaint sought declaratory relief as to both the statutory scheme and regulatory scheme pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. The second amended complaint also plead jurisdiction under the act, 16 U.S.C. § 460aa-3(a), in support of the request for declaratory relief on the regulations and alleged that the cause was proper for hearing before a three-judge court pursuant to 28 U.S.C. § 2282 and 2284, and plaintiff asked the court to enjoin the actions of the federal government in attempting to enforce both the statutory and regulatory schemes. Chief Judge Ray McNichols entered an order dated August 23, 1976 (a copy of which is appended hereto). The order denied appellant's motion for leave to file an amended complaint, made the June 25, 1976, order of the court final and dismissed the action *with prejudice*. The order was entered on behalf of the three-judge court.

Appellant Phyllis Anne Stewart filed notice of appeal to this court on September 22, 1976, with the clerk of the United States District Court for the District of Idaho. Appellant's jurisdictional ground before this court is 28 U.S.C. § 1253, which provides for direct appeal to this court from an order granting or denying

"an interlocutory or permanent injunction in any civil action, suit or proceeding required by any act of Congress to be heard and determined by a district court of three judges."

Plaintiff's complaint and amended complaints all asked for injunctive relief against enforcement of the act. A three-judge district court was empaneled pursuant to 28 U.S.C. § 2284. The court heard arguments, was advised in the matter, and on June 25, 1976, entered the order which held that "the statutory scheme [of the act] is well within the constitutional powers of Congress under eminent domain and property clauses of the United States Constitution." Subsequently, on August 23, 1976, Judge Ray McNichols, on behalf of the three-judge court, entered the order denying authorization to file an amended complaint and dismissal with prejudice. The order stated that "on June 25, 1976, this court entered an order dismissing the amended complaint of the plaintiff: (1) for lack of jurisdiction, and (2) *on a finding that the statute under attack was constitutional*", and made final the "order of this court, entered on June 25, 1976, dismissing the complaint of the plaintiffs . . ." (Emphasis supplied)

From the foregoing, it is apparent that both the June 25, 1976, order and the August 23, 1976, order were made and entered by the three-judge district court empaneled to hear the cause, and it is apparent that the court held that the statutory scheme in question was constitutional and "well within the constitutional powers of Congress under eminent domain and property clauses of the United States Constitution." By so doing, the court denied the injunctive relief

sought by plaintiffs to enjoin enforcement of the act of Congress, 16 U.S.C. § 460aa, et seq.

The three-judge court entered its decision based on and deciding the merits of the cause, holding the statutory scheme constitutional and denying the request for injunctive relief. Therefore, since the court decided the merits as a three-judge court and denied a permanent injunction, as requested, the requirements for direct appeal to this court as set out in 28 U.S.C. § 1253 have been met.

Although appellate jurisdiction in cases brought before three-judge district courts has been clouded in the past, this court has clarified and crystalized the criteria and it appears now to be law that a decision on the merits, i.e., a finding of constitutionality or the lack thereof and the granting or denial of an injunction based thereon, is appealable directly to this court pursuant to 28 U.S.C. § 1253.

#### THE QUESTIONS PRESENTED BY THIS APPEAL ARE SUBSTANTIAL

The questions presented by this appeal are substantial in that a decision as to the constitutional limitations on the power of the Congress of the United States to control private property within the various states is a basic decision affecting federal/state power division as well as constitutionally granted private rights of private citizens. The federal government itself has no inherent or constitutionally granted police power. Appellant does not contend that the Congress of the United States is without the power to enact legislation utilizing the constitutionally granted power

of eminent domain and legislation effectuating the property powers granted by the United States Constitution.

However, the "authorization" provided in the act in question granting the Secretary of Agriculture the authority to promulgate rules and regulations to control the use and subdivision of privately owned real property within the boundaries of the Sawtooth National Recreation Area in Idaho goes beyond the scope of the eminent domain and property powers and invades the previously state-controlled area of land use planning and zoning.

The act is unconstitutionally vague and over-board and the "standards" set down are so subjective as to not allow the act to be properly administered. The act, because of its lack of standards and guidelines, deprives appellant and many others similarly situated of their right to due process.

Persons owning real property within the area live in the shadow of the possibility of condemnation under the act with no adequate guidelines set down therein to guide the application of the act. The act does not set out standards which insure against arbitrary application and the appellant's rights are thereby unconstitutionally violated. The foregoing, when taken in conjunction with the unconstitutional exercise of a "federal police power" as to privately owned lands, renders the act unenforceable and its application should be enjoined by a declaration of this court holding it unconstitutional.

The vagueness of the act and the "federal police power" type of application present issues which re-

quire plenary consideration with briefs on the merits and oral argument for resolution. It is hereby requested by appellant that this court note probable jurisdiction of this matter.

DATED November 22, 1976.

RESPECTFULLY SUBMITTED,  
RUNFT & LONGEIG, CHARTERED

---

TERRY E. COFFIN, of the Firm  
Attorneys for Appellant

## APPENDIX A

### TITLE 16—CONSERVATION SAWTOOTH NATIONAL RECREATIONAL AREA [NEW]

#### § 460aa. Establishment of area.

##### (a) Statement of purposes.

In order to assure the preservation and protection of the natural, scenic, historic, pastoral, and fish and wildlife values and to provide for the enhancement of the recreational values associated therewith, the Sawtooth National Recreation Area is hereby established.

##### (b) Publication in Federal Register; description of boundaries.

The Sawtooth National Recreation Area (hereafter referred to as the "recreation area"), including the Sawtooth Wilderness Area (hereafter referred to as the "wilderness area"), shall comprise the lands generally depicted on the map entitled "Sawtooth National Recreation Area" dated June 1972, which shall be on file and available for public inspection in the office of the Chief, Forest Service, Department of Agriculture. The Secretary of Agriculture (hereafter referred to as the "Secretary") shall, as soon as practicable after August 22, 1972, publish a detailed description and map showing the boundaries of the recreation area in the Federal Register. (Pub. L. 92-400, § 1, Aug. 22, 1972, 86 Stat. 612.)

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 460aa-1 to 460aa-3, 460aa-5, 460aa-6, 460aa-8, 460aa-12, 460aa-14 of this title.

**§ 460aa-1. Administration.**

**(a) Recreation area.**

The Secretary shall administer the recreation area in accordance with the laws, rules and regulations applicable to the national forests in such manner as will best provide (1) the protection and conservation of the salmon and other fisheries; (2) the conservation and development of scenic, natural, historic, pastoral, wildlife, and other values, contributing to and available for public recreation and enjoyment, including the preservation of sites associated with and typifying the economic and social history of the American West; and (3) the management, utilization, and disposal of natural resources on federally owned lands such as timber, grazing, and mineral resources insofar as their utilization will not substantially impair the purposes for which the recreation area is established.

**(b) Wilderness area.**

The lands designated as the Sawtooth Wilderness Area, which supersedes the Sawtooth Primitive Area, shall be administered in accordance with the provisions of sections 460aa to 460aa-14 of this title and the provisions of the Wilderness Act, whichever is more restrictive, except that any reference in such provisions to the effective date of the Wilderness Act shall be deemed to be a reference to the effective date of this Act. (Pub. L. 92-400, § 2, Aug. 22, 1972, 86 Stat. 612.)

**REFERENCES IN TEXT**

Wilderness Act, referred to in subsec. (b), is classified to chapter 23 of this title.

Effective date of this Act, referred to in subsec. (b), means date of enactment of Pub. L. 92-400, which was approved Aug. 22, 1972.

**SECTION REFERRED TO IN OTHER SECTIONS**

This section is referred to in sections 460aa-2, 460aa-3, 460aa-5, 460aa-6, 460aa-8, 460aa-12, 460aa-14 of this title.

**§ 460aa-2. Acquisition of land.**

**(a) Authority of Secretary; manner; limitation; "scenic easement" defined.**

Except as provided in section 460aa-3 of this title, the Secretary is authorized to acquire by donation, purchase with donated or appropriated funds, exchange, bequest, or otherwise any lands, or lesser interests therein, including mineral interests and scenic easements, which he determines are needed for the purposes of sections 460aa to 460aa-14 of this title: *Provided*, That acquisitions of lands or interests therein for access to and utilization of public property, and for recreation and other facilities, shall not exceed five per centum of the total acreage of all private property within the recreation area as of the effective date of sections 460aa to 460aa-14 of this title.

As used in sections 460aa to 460aa-14 of this title the term "scenic easement" means the right to control the use of land in order to protect the esthetic values for the purposes of such sections, but shall not preclude the continuation of any use exercised by the owner as of August 22, 1972.

(b) Offers of land; hardship from acquisition delays.

In exercising this authority to acquire lands, the Secretary shall give prompt and careful consideration to any offer made by an individual owning any land, or interest in land, within the boundaries described in section 460aa(b) of this title. In considering such offer, the Secretary shall take into consideration any hardship to the owner which might result from any undue delay in acquiring his property.

(c) Condemnation proceedings.

The Secretary may utilize condemnation proceedings without the consent of the owner to acquire private lands or interests therein pursuant to this section only in cases where, in his judgment, all reasonable efforts to acquire such lands or interests therein by negotiation have failed, and in such cases he shall acquire only such title as, in his judgment, is reasonably necessary to accomplish the objectives of sections 460aa to 460aa-14 of this title.

(d) Exchange of property; cash equalization payments.

In exercising his authority to acquire property by exchange, the Secretary may accept title to any non-Federal property, or interests therein, located within the recreation area and, notwithstanding any other provision of law, he may convey in exchange therefor any federally owned property within the State of Idaho which he classifies as suitable for exchange and which is under his administrative jurisdiction. The values of the properties so exchanged shall be approximately equal or, if they are not approximately equal,

they shall be equalized by the payment of cash to the grantor or to the Secretary as the circumstances require. In the exercise of his exchange authority, the Secretary may utilize authorities and procedures available to him in connection with exchanges of national forest lands.

(e) Mineral interests.

Nothing in sections 460aa to 460aa-14 of this title shall be construed as limiting the authority of the Secretary to acquire mineral interests in lands within the recreation area, with or without the consent of the owner. Upon acquisition of any such interest, the lands and/or minerals covered by such interest are by such sections withdrawn from entry or appropriation under the United States mining laws and from disposition under all laws pertaining to mineral leasing and all amendments thereto.

(f) State lands.

Any land or interest in land owned by the State of Idaho or any of its political subdivisions may be acquired only by donation or exchange.

(g) Transfer from Federal agency to administrative jurisdiction of Secretary.

Notwithstanding any other provision of law, any Federal property located within the recreation area may, with the concurrence of the agency having custody thereof, be transferred without consideration to the administrative jurisdiction of the Secretary for use by him in carrying out the purposes of sections 460aa to 460aa-14 of this title. Lands acquired by the

Secretary or transferred to his administrative jurisdiction within the recreation area shall become parts of the recreation area and of the national forest within or adjacent to which they are located.

(h) Condemnation authority.

Except as otherwise provided, the Secretary shall have the authority to use condemnation as a means of acquiring a clear and marketable title, free of any and all encumbrances. (Pub. L. 92-400, § 3, Aug. 22, 1972, 86 Stat. 612.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 460aa-1, 460aa-3, 460aa-5, 460aa-6, 460aa-8, 460aa-12, 460aa-14 of this title.

§ 460aa-3. Private land, regulations.

(a) Use, subdivision and development standards; detail and specificity; land differences; amendment; promulgation; civil actions; jurisdiction, complaint, declaratory judgment.

The Secretary shall make and publish regulations setting standards for the use, subdivision, and development of privately owned property within the boundaries of the recreation area. Such regulations shall be generally in furtherance of the purposes of sections 460aa to 460aa-14 of this title and shall have the object of assuring that the highest and best private use, subdivision, and development of such privately owned property is consistent with the purposes of such sections and with the overall general plan of the recreation area. Such regulations shall be as detailed and specific

as is reasonably required to accomplish such objective and purpose. Such regulations may differ amongst the several parcels of private land in the boundaries and may from time to time be amended by the Secretary. All regulations adopted under this section shall be promulgated in conformity with the provisions of the Administrative Procedure Act. The United States District Court for the District of Idaho shall have jurisdiction to review any regulations established pursuant to the first sentence of this subsection, upon a complaint filed within six months after the effective date of such regulations, by any affected landowner in an action for a declaratory judgment.

(b) Condemnation restriction; acquisitions limitation.

After publication of such regulations, no privately owned lands shall be acquired by the Secretary by condemnation unless he determines, in his judgment, that such lands are being used, or are in imminent danger of being used, in a manner incompatible with the regulations established pursuant to this section or unless such lands are determined to be necessary for access or development, in which case such acquisitions shall be subject to the 5 per centum limitation established in section 460aa-2(a) of this title. (Pub. L. 92-400, § 4, Aug. 22, 1972, 86 Stat. 613.)

REFERENCES IN TEXT

Administrative Procedure Act, referred to in subsec. (a), is classified to sections 551 et seq. and 701 et seq. of Title 5, Government Organization and Employees.

**SECTION REFERRED TO IN OTHER SECTIONS**

This section is referred to in section 460aa-1, 460aa-2, 460aa-5, 460aa-6, 460aa-8, 460aa-12, 460aa-14 of this title.

**APPENDIX B**

**U.S. DISTRICT COURT  
DISTRICT OF IDAHO**

**Filed at 4:10 P.M.**

**JUNE 25, 1976**

**JERRY L. CLAPP, Clerk**

**By..... Deputy**

**UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF IDAHO**

**Civil No. 4-74-42**

**ORDER**

FRED R. STEWART, et al.,  
*Plaintiffs,*  
vs.  
THE UNITED STATES OF AMERICA,  
et al.,  
*Defendants.*

This matter having come before the three-judge court to consider all pending motions; and the Court having considered the briefs and other documentary filings; and having heard oral argument enters the following orders:

1. The complaint fails to allege the jurisdiction of this Court to consider the constitutionality of the Sawtooth National Recreational Area Act. The Court therefore lacks subject-matter jurisdiction. The Motion of the defendant to dismiss for lack of jurisdiction is granted.

2. Assuming arguendo that jurisdiction is alleged, we hold that the statutory scheme is well within the constitutional powers of Congress under eminent domain and property clauses of the United States Constitution.

3. No substantial federal constitutional question is presented and the three-judge Court is dissolved.

4. Nothing in these rulings is intended to determine the validity of any regulation promulgated under the Act as the same may be applied to any individual property ownership.

IT IS THEREFORE ORDERED:

That the complaint is dismissed for lack of jurisdiction. This dismissal is without prejudice to the right of amendment and without prejudice to any subsequent complaint attacking the application of any promulgated regulation to any specific land ownership.

RAY McNICHOLS, Judge  
United States District Court  
M. OLIVER KOELSCH, Judge  
United States Court of Appeals  
J. BLAINE ANDERSON, Judge  
United States District Court

U.S. DISTRICT COURT  
DISTRICT OF IDAHO  
Filed at 4:30 P.M.

Aug. 23, 1976  
JERRY L. CLAPP, Clerk

By.....Deputy

UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF IDAHO

Civil No. 4-74-42

ORDER DENYING AUTHORIZATION  
TO FILE AMENDED COMPLAINT  
AND DISMISSAL WITH PREJUDICE

PHYLLIS ANNE STEWART,  
*Plaintiff,*  
vs.  
UNITED STATES OF AMERICA,  
et al.,  
*Defendants.*

On June 25, 1976, this Court entered an Order dismissing the Amended Complaint of the plaintiffs: (1) for lack of jurisdiction, and (2) on a finding that the statute under attack was constitutional.

Phyllis L. Stewart, one of the original plaintiffs, seeks authorization to file a Second Amended Complaint, which Second Amended Complaint, while alleging jurisdiction specifically under 28 USC § 1331, actu-

ally again seeks to have a three-judge court empanelled to determine the constitutionality of the statute and to restrain enforcement hereof.

Defendant has objected to the filing of a Second Amended Complaint on the ground that it is a mere re-recitation of the first two complaints.

The Three-Judge Court has considered the proposed Amended Complaint and has determined to deny filing of the same as being generally merely repetitive of prior complaints found to raise no substantial constitutional issue.

**ACCORDINGLY, IT IS ORDERED:**

That this Three-Judge Court does deny plaintiff's Motion to File a Second Amended Complaint. The prior Order of this Court, entered on June 25, 1976, dismissing the Complaint of the plaintiffs, is made final.

This Order is without prejudice to this single plaintiff pursuing any cause of action she may have under 16 USC § 460aa3.

**FOR THE COURT**  
By Direction Of:  
**RAY McNICHOLS, Judge**  
United States District Court

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO**

Civil No. 4-74-42

**NOTICE OF APPEAL**

**PHYLLIS ANN STEWART,**  
*Plaintiff,*  
vs.  
**THE UNITED STATES OF AMERICA;**  
EARL BUTZ, Secretary of Agriculture of  
the United States of America; and GRAY  
F. REYNOLDS, Superintendent and Area  
Ranger having administrative authority  
for the Sawtooth National Recreation  
Area, in his official capacity,  
*Defendants.*

Filing  
Stamp  
Dated  
9/22/76

**NOTICE IS HEREBY GIVEN** that plaintiff, Phyllis Anne Stewart, hereby appeals to the United States Supreme Court, from the final order of the three-judge district court made and entered on behalf of the three-judge court by Judge Ray McNichols, Chief Judge of the United States District Court for the District of Idaho, a member of the three-judge court, on August 23, 1976, Civil No. 4-74-24, United States District Court for the District of Idaho.

Plaintiff appeals from that portion of the order which makes final the June 25, 1976, order of the three-judge court finding that the "statute under attack was constitutional." (The Act establishing the

Sawtooth National Recreation Area, 16 U.S.C. § 460aa.)

This appeal is taken pursuant to 28 U.S.C. § 1253. No certification pursuant to 28 U.S.C. § 2403 is required since the United States is a party to this action.

Dated this 22nd day of September, 1976.

RUNFT & LONGEIG,  
CHARTERED

TERRY E. COFFIN,  
of the Firm

JOHN L. RUNFT,  
of the Firm

Attorneys for Plaintiff

Earl Butz  
Secretary of Agriculture  
Washington, D.C. 20530

Mr. Gray F. Reynolds,  
Superintendent  
Sawtooth National Rec-  
reation Area  
Ketchum, Idaho 83340

TERRY E. COFFIN

CERTIFICATE OF MAILING

I HEREBY CERTIFY that service of the within and foregoing NOTICE OF APPEAL was made this 22nd day of September, 1976, by mailing a copy thereof, airmail, to the following named persons:

Mr. Wilbur Nelson  
United States Attorney's  
Office  
Federal Building  
Boise, Idaho 83702

Solicitor General of the  
Department of Justice  
Washington, D.C. 20530

JAN 31 1977

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

PHYLIS ANNE STEWART, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF IDAHO

MOTION TO DISMISS OR AFFIRM

DANIEL M. FRIEDMAN,  
*Acting Solicitor General.*

PETER R. TAFT,  
*Assistant Attorney General.*

GEORGE R. HYDE,  
MARYANN WALSH,  
*Attorneys,*  
*Department of Justice,*  
*Washington, D.C. 20530.*

In the Supreme Court of the United States  
OCTOBER TERM, 1976

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No. 76-712

PHYLLIS ANNE STEWART, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

---

*ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF IDAHO*

---

**MOTION TO DISMISS OR AFFIRM**

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Pursuant to Rule 16(1)(a) and (c) of the Rules of this Court, the appellees move that this appeal be dismissed for lack of jurisdiction on the ground that the district court's dismissal of appellant's suit for lack of a substantial constitutional question is appealable only to the court of appeals; or, in the alternative, that the orders of the district court be affirmed because the grounds for appeal are so unsubstantial as not to need further argument.

**STATEMENT**

On October 29, 1974, appellant and other private property owners in Idaho filed suit in the United States District Court for the District of Idaho challenging the constitutionality of the Act establishing the Sawtooth National Recreation Area in Idaho, 86 Stat. 612, 16 U.S.C. (Supp. V) 460aa *et seq.* (hereinafter, the Act).

Jurisdiction was based solely on 16 U.S.C. (Supp. V) 460aa-3(a), which gives the United States District Court for the District of Idaho jurisdiction:

to review any regulations established pursuant to the first sentence of this subsection\* \* \*.

The Secretary of Agriculture, pursuant to Section 460aa-3 (a), had promulgated regulations setting standards for the use and development of private land within the boundaries of the Sawtooth National Recreation Area, which became effective April 29, 1974, 39 Fed. Reg. 11544, 36 C.F.R. 292.14 *et seq.* The plaintiffs also sought to enjoin enforcement of the Act and its regulations, a declaratory judgment that private land was not subject to the Act, and the convening of a three-judge court.

A three-judge court was designated to hear the matter, pursuant to 28 U.S.C. 2282 and 2284.<sup>1</sup> An amended complaint was filed on October 7, 1975, alleging jurisdiction pursuant to 16 U.S.C. (Supp. V) 460aa-3(a) and "pursuant to the Court's pendent jurisdiction arising in connection therewith." After a hearing, the three-judge court on June 25, 1976, dismissed the complaint: (1) for lack of subject-matter jurisdiction because the complaint failed to allege the court's jurisdiction to consider the constitutionality of the Act; (2) on the ground that, even if the court had jurisdiction, "the statutory scheme is well within the constitutional powers of Congress under eminent domain and property clauses of the United States Constitution"; and (3) because no substantial federal constitutional question was presented (J.S. App. 1b-2b).

<sup>1</sup>Section 2282 has been repealed and Section 2284 has been amended so as to eliminate the three-judge court requirement except in circumstances not applicable here; the amendment does not apply to actions commenced prior to August 12, 1976, the date of its enactment. Pub. L. 94-381, 90 Stat. 1119.

Instead of appealing from that judgment, appellant moved on July 26, 1976, for leave to file a second amended complaint. On August 23, 1976, the three-judge court denied the motion as "merely repetitive of prior complaints found to raise no substantial constitutional issue" (J.S. App. 4b). Its order, which was entered by District Judge McNichols pursuant to the three-judge court's direction, also stated that the court's order of June 25, 1976, "is made final" (J.S. App. 4b). The dismissal was "without prejudice to this single plaintiff pursuing any cause of action she may have under 16 USC § 460aa-3" (*ibid.*). Appellant appeals to this Court from "that portion of the order [of August 23, 1976] which makes final the June 25, 1976, order \* \* \* finding that the 'statute under attack was constitutional'" (J.S. App. 5b).<sup>2</sup>

#### ARGUMENT

1. Appellant invokes this Court's jurisdiction under 28 U.S.C. 1253 on the ground that the three-judge district court, in its June 25, 1976 order, stated that even if jurisdiction had been alleged the challenged statute was constitutional. This order was followed by the August 23, 1976 order, denying leave to file a second amended complaint.

Appellant took no appeal from the first order. In our view, the second order, which she does seek to appeal, is not directly reviewable in this Court. That order rests on the fact that appellant's amended complaint was the same as "prior complaints found to raise no substantial constitutional issue" (J.S. App. 4b). A determination of unconstitutionality is not a determination on the merits; it is a jurisdictional disposition that requires dissolution of the three-judge

<sup>2</sup>On October 19, 1976, appellant also filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit.

court. *California Water Service Co. v. Redding*, 304 U.S. 252, 254-256. Such a decision is reviewable only in the court of appeals because "a direct appeal will lie to this Court under § 1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below." *MTM, Inc. v. Baxley*, 420 U.S. 799, 804; *Gonzalez v. Employees Credit Union*, 419 U.S. 90, 100-101; *Schackman v. Arnebergh*, 387 U.S. 427; *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715. A decision of a three-judge court dissolving itself on jurisdictional grounds for want of a substantial constitutional question is, in effect, the same as a decision by a single district judge refusing to convene a three-judge court on the same ground, and is therefore not within this Court's jurisdiction under 28 U.S.C. 1253. *Gonzalez v. Employees Credit Union, supra*; *Wilson v. City of Port Lavaca*, 391 U.S. 352.

The only possible doubt stems from the facts that the court's August order said its June order "is made final" and that in the June order the court, assuming *arguendo* that jurisdiction had been alleged, stated that the Act was within Congress' constitutional authority. Appellant apparently views the August order as a reissuance of the June order in which, according to appellant, the court resolved the constitutional question on the merits. Although we agree that appellant's reading of the "made final" language is possible, we do not believe it is the correct interpretation. Rather, it appears to us that the court merely intended to emphasize that it would adhere to its previous ruling in June; and the court's August order interpreted its previous ruling as resting on the lack of a substantial constitutional question. The August order therefore is appealable only to the court of appeals (and appellant has filed a notice of appeal to that court).

Although the foregoing indicates that the appeal should be dismissed, because of the ambiguity of the court's August order we entertain sufficient doubt on that score that we think it appropriate to discuss the merits of appellant's constitutional claim. If the Court decides that the August order resolved the constitutional issue on the merits and is therefore directly appealable, we submit that the judgment below should be affirmed.

2. Congress has authority to regulate recreational areas on public lands (cf. *Kleppe v. New Mexico*, No. 74-1488, decided June 17, 1976, slip op. 11-16) and to encourage owners of private property within such areas to conform their uses to the natural, historic and recreational purposes for which such areas are created, so that the government will not have to acquire their property by eminent domain. To this end, the Act provides that the Secretary of Agriculture shall publish regulations "for the use, subdivision, and development of privately owned property within the boundaries of the recreation area" consistent with its purposes, subject to judicial review in the district court on suit by any affected landowner. 16 U.S.C. (Supp. V) 460aa-3(a).

No privately owned lands may be acquired by condemnation unless the Secretary determines that the lands are being, or are in imminent danger of being, used in a manner incompatible with the regulations, or are necessary for access or development. 16 U.S.C. (Supp. V) 460aa-3(b). Even if such a determination is made, lands or interests therein may not be subjected to condemnation proceedings without the consent of the owner, unless all reasonable efforts to acquire the land or interests by negotiation have failed. 16 U.S.C. (Supp. V) 460aa-2(c).

Thus the provisions in the Act for regulations controlling land use are designed to preserve private ownership within the recreational area to the maximum extent consistent with

its purposes, and to provide for the condemnation of land for those purposes only when necessary. Congress' authority to utilize the power of eminent domain in this manner is well established. *Berman v. Parker*, 348 U.S. 26, 33. The Act's provisions and regulations thereunder do not threaten or interfere with appellant's quiet enjoyment of her property. To the extent that her lands or lesser interests therein are taken, appellant is entitled to just compensation. Cf. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 125-136. The Act is thus constitutional under Congress' power to regulate the property of the United States (United States Constitution, Art. 4, Sec. 3, Cl. 2) and to acquire property for public use upon payment of just compensation under the Fifth Amendment. See *Berman v. Parker, supra*.

#### CONCLUSION

For the reasons stated, this appeal should be dismissed; in the alternative, the order of the district court should be affirmed.

Respectfully submitted.

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